PUBLIC PROSECUTOR

v.

NUR HASSAN BIN SALIP HASHIM & ANOR.

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN JC
[CRIMINAL TRIAL NO. 2 OF 1988]
13 APRIL 1993

DANGEROUS DRUGS: Prosecution and defence evidence at variance -Whether prosecution or defence evidence credible and worthy of belief - Whether presumptions under Dangerous Drugs Act 1952 rebutted - Whether reasonable doubt exists - Sentence to be passed - Whether accused a juvenile.

The second Accused's defence was called for after a *prima facie* case as regards the custody and control of cannabis was established against him. The question that arose was whether the second Accused had managed to rebut the statutory presumptions arising from custody or control of the orange plastic bag containing the cannabis.

Held:

[1] The facts of the second Accused sitting immediately beside the cannabis in a very confined area of the restaurant, trying to run away and trying to screen the cannabis from sight after being confronted by the police justify the conclusion that the second Accused had control or custody of the orange plastic bag containing the cannabis at the time the police approached and arrested him.

[2] The evidence of the second Accused was one of denial of, ever having seen the orange plastic bag containing the cannabis, having been together with the first Accused, sitting on the same chair together with the first Accused and of being found immediately next to the orange plastic bag containing the cannabis. The denials have not in any way created any doubt, on a balance of probabilities, in the case of the prosecution.

[3] Nothing was offered by the evidence of the second Accused by way of rebutting the presumption of trafficking arising from the fact that the cannabis weighed 311.4 grammes.

[4] There was a doubt as to whether the Accused was over or under the age of 18 at the date of the commission of the offence and the doubt should be resolved in favour of the Accused.

[Accused found guilty and convicted. Accused ordered to be detained during the pleasure of the Yang Di-Pertua Negeri Sabah].

Case referred to:

Mohamad Radhi bin Yaakob v. PP [1991] 3 CLJ 2073 ***(refd)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 37(d), 39B(1)(a), (2)
Juvenile Courts Act 1947, s.16

For the Public Prosecutor - Gani Bin Patail, SFC
For the second Accused - Francis Chia

JUDGMENT

Ian H.C. Chin JC:

I . *General*

Ronni bin Sabdani ("second accused") was initially charged together with Nur Hassan Bin Salip Hashim ("first accused") for trafficking in 311.4 grammes of cannabis in a restaurant in Semporna called Ali Restaurant in furtherance of their common intention on 20 January 1987. At the close of the prosecution case I discharged and acquitted the first Accused without calling upon him to enter upon his defence. The grounds of my decision are set out elsewhere.

II. *Charge Against Second Accused*

As for the second Accused I called upon him to enter upon his defence on the following amended charge:

> You Ronni Bin Sabdani are charged and the charge against you are as follows:
>
> That you, on 20 January 1987, at about 8.50 a.m. in Ali Restaurant, in the District of Semporna, in the State of Sabah, on your own behalf, did traffic in a dangerous drug, to wit, 311.4 grammes of cannabis, in contravention of the provisions of s. 39B(1)(a) of the Dangerous Drugs Act 1952 and that you have thereby committed an offence punishable under s. 39B(2) of the said Act.

III. *Prosecution Evidence*

It is necessary to again state what the evidence of the prosecution was at the close of the case for the prosecution though I have done so already in my written ruling at the close of the

prosecution case as to whether a case had been made out. The facts are as follows.

One Inspector Ahmad Taufek Bin Abdullah (PW7) on 19 January 1987 at about 7.00 p.m. was supplied by his informer information that there will be people who will sell "ganja" at the area of the Semporna market. On 20 January 1987 at 7.45 a.m. he organised a police party comprising himself, one Corporal Sukup Lamudin (PW3) and one Corporal Madsarapi Bin Mahijalan (PW4) to lay in wait with the informer at a shop ("shop"). At about 8.00 a.m. the police party entered the shop which was opposite, across a dual carriageway, a restaurant called Ali Restaurant ("restaurant"). The informer was already in the shop when the police party entered the shop. At 8.40 a.m. the informer pointed out the two accused to PW7 who saw the first accused carry an orange plastic bag. The two accused were walking on the five-foot way on a row of shops on the other side of the dual carriageway. PW7 saw the two accused enter the restaurant. He asked the informer to leave and then instructed PW4 to go first to the restaurant for the purpose of guarding the rear entrance of the restaurant. After PW4 had entered the restaurant he and PW3 followed suit. At the restaurant he saw the two accused seated side by side on a long chair. He approached the two accused and when about five feet away he introduced himself by saying "police" after which the first Accused quickly got up and tried to go to the back of the restaurant. He did not try to catch hold of the first Accused. He instead stopped the second Accused from getting out of the chair by pushing his hand in a forward motion towards the second Accused and the second Accused thereafter sat down. He saw the second Accused push something behind his back. After the first Accused was arrested he ordered the second Accused to get out from his seat. The second Accused then slided out of the chair and was handcuffed to the first Accused by PW3. PW3 and PW4 had by then arrested the first Accused. One pair of handcuffs was used to handcuff both the accused. After the second Accused had left his seat he saw an orange plastic bag at the seat inside which he found, among other things, dried vegetable matter wrapped in newspaper (which the chemist Khalid Safan (PW1) testified was cannabis) and placed inside yet another plastic bag.

PW7 on 20 January 1987 handed the cannabis to Inspector Ratan Kumar Singh (PW8) who had custody until 4 February 1987 when he handed the cannabis to the chemist PW1 for analysis and examination. PW1 thereafter had custody of the cannabis until 2 March 1987 when he handed the same to one Azman Dagi (PW5), the then OCPD, Semporna. PW5 kept the cannabis until 6 March 1987 whence it was handed back to PW8 who kept it in the exhibit store until it was brought to the Court on 29 March 1993 by a constable Anthony Jeremy.

PW1 had analysed and weighed the matter found in the said orange plastic bag. He testified that the matter was cannabis within the meaning of the Dangerous Drugs Act 1952 and that the cannabis weighed 311.4 grammes.

PW3 testified that he was behind PW7 when PW7 introduced himself as the police. He also confirmed that the first Accused tried to run away but was stopped by PW4. He testified that he helped PW4 to arrest the first Accused and that he handcuffed the first and second Accused together. He also saw the orange plastic bag which PW7 saw after the second Accused had slided out of the chair. PW4 generally confirmed what PW7 had testified save that PW3 testified that he handcuffed the second Accused while the second Accused was seated in the chair. He added that the first Accused after being caught by him tried to struggle free.

As for the age of the second Accused one Dr. Sethu Nagappan (PW2), a physician specialist, testified that he on 6 February 1987 examined the second Accused and he was of the opinion that the Accused was below 20 but above 18 as at 6 February 1987. PW2 puts the margin of error at one year.

IV. *Defence Evidence*

The second Accused gave evidence on oath. He testified that he was born on 12 November 1971. He entered Sabah illegally in 1986. On 20 January 1987 he went to Semporna town to buy cheap clothing. He felt hungry and went inside a restaurant called Ali Restaurant. He took a seat on the left side (as one looks into the restaurant from the entrance) of the restaurant, different from that which the prosecution alleged he sat on. There were many people in the shop. He was bending forward to

eat the mee he had ordered when he heard a loud noise coming from the back and he could not see because his view was obstructed by the high back of the chair. He stood up, looked behind him, heard something break and saw people rushing out of the restaurant. He also wanted to rush out but could not do so because he was grabbed on the left hand and then handcuffed by someone. The police thereafter sat him in another chair and said to him "kau diam aku polis". The first Accused, whom he does not know and had never seen before, was thereafter brought to sit next to him. The first Accused was handcuffed and blood was streaming down his head. He did not see the orange plastic bag (P12), the white plastic bag (P6) or the cannabis (P10) in the restaurant. He was taken to the police station and put in a lock-up but was later taken out and shown an orange plastic bag by PW7 and PW7 asked him "siapa punya ini?". Those were the evidence of the second Accused given in examination-in-chief.

V. *Which Version to Accept*

Against the prosecution evidence that the first and second Accused were, just before their arrest, seated together on the same chair in a restaurant with the second Accused having an orange plastic bag containing cannabis placed just by his side and which he tried to hide when about to be arrested by the police, the second Accused's evidence is that he was, just before his arrest, not seated on the same chair with the first Accused and there was no such orange plastic bag containing cannabis in the restaurant let alone as having been found beside him.

The prosecution evidence is principally that of PW3, PW4 and PW7, all of whom are policemen. They corroborated each other in all the material aspects of the evidence. PW3 came through unscathed after being cross-examined for about an hour. He was steadfast as regards the accuracy of the evidence he had given and he maintained that he saw the orange plastic bag containing the cannabis on the chair where the second Accused sat. PW4, who entered the restaurant after the two accused had entered but ahead of PW3 and PW7, also testified that he saw the two accused seated together and that he saw PW7 recover the orange plastic bag containing the cannabis from the chair where the two accused had sat and with the bag close to the wall and therefore close to the second Accused. The evidence of PW4 after two hours of cross-examination also came out unshaken. PW7 only had to endure 39 minutes of cross-examination. He gave his evidence in a straight forward manner and without any hesitation. There is nothing to suggest that these three witnesses, PW3, PW4 and PW7, have in any aspect of their evidence been mistaken or had lied or had concocted their stories. The defence suggests that the second Accused was simply picked up in the restaurant to face the rap which necessary means that the said three policemen were callous enough to simply frame the second Accused. There is nothing in the evidence to even remotely hint that a frame up is probable. The policemens' evidence, that is, that of PW3, PW4 and PW7, are consistently accurate and credible. I therefore find as a fact that on 20 January 1987 the second Accused was, in Ali Restaurant in Semporna, sitting immediately beside the orange plastic bag (P12) containing cannabis (P10) that weighed 311.4 grammes. I reject the version given by the second Accused. The second Accused was so eager to emphasise that he was seated in a chair other than that alleged by the prosecution that he would volunteer statements to the effect that there are more tables than that alleged by the prosecution during cross-examination when he was not yet asked the question relating thereto. Even though not called upon yet, he wanted to perform what he had probably rehearsed. One aspect of the evidence of the second Accused's version could very well be a recent invention and that was the allegation by the second Accused's that it was only in the police station after he was arrested that PW7 tried to establish the ownership of the orange plastic bag by showing him the said bag and by PW7 allegedly asking him: "siapa punya ini?". This was supposed to be the first time the second Accused has seen the orange plastic bag and yet this was not put to PW7 when PW7 was giving evidence. The evidence was not only untested but unworthy of credit and smacking of a recent invention. The sequel in the story of the second Accused is at times *non sequitur* and this can be gathered from his allegation that one policeman had asked him to keep quiet when the second Accused evidence did not show he was making any noise or saying anything and thus makes it inherently

improbable that the police had asked him to keep quiet; and then again also, this was not put to the prosecution witness. Having seen and heard the second Accused give evidence and for the reasons I have hitherto set out I am of the opinion that the second Accused was not telling the truth and I reject his version as to what happened in the restaurant and in the police station.

I will now proceed to consider whether the various presumptions have been rebutted on a balance of probabilities and whether any doubt, on a balance of probabilities, had been created in the case against the second Accused by his evidence even though I disbelieve the second Accused; a course I must take. See *Mohamad Radhi bin Yaakob v. PP* [1991] 3 CLJ 2073.

VI. Whether presumptions rebutted and whether reasonable doubt exists.

This issue revolves around the question of whether the second Accused had custody or control. Francis Chia, Esq., Counsel for the second Accused, argued that the prosecution had failed to prove the second Accused had "exclusive custody and control" of the orange plastic bag containing the cannabis. It is actually "custody **or** ... control" (and not "**and**") that the prosecution must prove. See s. 37(d) of the Dangerous Drugs Act 1952. The contentions are grounded as follows:

(1) the prosecution witnesses could not have, through the heavily tinted glass of the shop, seen the first Accused and the second Accused walking together on the five-foot away just before they entered the restaurant;
(2) the second Accused was not at any time before his arrest seen carrying the orange plastic bag containing the cannabis;
(3) it is the prosecution case that it was the first Accused who has carried the said orange plastic bag containing the cannabis before the first Accused and the second Accused entered the restaurant;
(4) the fact of the cannabis being found on a chair occupied by the first Accused and the second Accused;
(5) that the orange plastic bag containing the cannabis was found near the second Accused could very well be due to the fact that it was placed there by the first Accused and thereafter the second Accused sat by it at the invitation of the first Accused;
(6) there was no finger-print evidence to incriminate the second Accused.

It is necessary for me to recap the evidence upon which I found a *prima facie* case as regards the custody or control of the cannabis. The second Accused was seated immediately next to the cannabis which was placed on a chair in between the second Accused and the wall and the cannabis had a table to its front and the high back of a chair to its rear. At the moment the second Accused was found with the cannabis, no one can access the same without going through the second Accused. The cannabis was located in a very confined area though in a public restaurant and this together with the attempt of the second accused to get away and to screen the cannabis from the sight of PW7 after being confronted by PW7 are evidence supporting the *prima facie* conclusion that the second Accused had custody or control of the cannabis giving rise to the presumptions of possession and knowledge and also of trafficking as the weight of the cannabis was 311.4 grammes.

I will now deal with the contentions of Counsel for the second Accused altogether as there is interplay between them. I have earlier ruled, when deciding whether to call for the defence, that there is no evidence to show that the orange plastic bag that the first Accused carried on the five-foot way was the same one which was found in the restaurant beside the second Accused. There was no evidence as to what happened to the orange plastic bag after the first Accused had entered the restaurant. Except for the identification of the two accused by the prosecution witnesses while the two accused were on the five-foot way before they entered the restaurant, I do not attach any importance to the allegation of the prosecution witnesses that the very orange plastic bag the first Accused carried on the five-foot way was the same orange plastic bag, containing cannabis, which was found beside the second Sccused in the restaurant; in fact, I have rejected that contention in my ruling regarding a *prima facie* case. But I do find as a fact that you can see a well-lit place through the tinted glass. In this case, it was in the morning and the place where the two accused were seen was therefore well-lit. I daily look through the heavily tinted windows

of the car I use and there is no doubt at all that you can, from inside the car, see clearly through the tinted glass at any place, within eyesight, which has light, be it sunlight or artificial light.

There is no requirement that the second Accused must be proven to have been holding the orange plastic bag for a certain period of time before he can be said to be in custody or control of the same. A person can have remote control or custody as, for example, in the case of a person who owns or possesses the drug but gave it to someone else to carry or deliver the same but maintains constant contact with the carrier or deliverer by giving instructions over the mobile phones to the carrier or deliverer with regards to the drug. Even though it cannot be proved that the person had at anytime been in physical possession of the drug but if it can be proved, in the example given, that he gave constant instructions to the carrier or deliverer as to the disposal or movement of the drug, the person, I am of the opinion, can be said to be in custody or control of the drug, *albeit* remotely by mobile phones. The facts and circumstances of the case may justify the conclusion that a person had control or custody. As stated earlier, the fact of the second Accused sitting immediately beside the cannabis in a very confined area of the restaurant, the fact of the second Accused trying to run away and the fact of the second Accused trying to screen, by pushing it behind his back, the cannabis from sight after being confronted by the police justify my conclusion that the second Accused had control or custody of the orange plastic bag containing the cannabis at the time the police approached and arrested him. Therefore, it cannot be the law that a person must be in actual physical possession of the drug or of the receptacle containing the drug before he can be said to have custody or control. It follows that for the reasons I have just given it matters not that the second Accused was not at any time seen carrying the orange plastic bag containing the cannabis bag.

The evidence that the first Accused was seated next to the second Accused does not detract from the fact that the second Accused, and not the first Accused, was seated immediately beside the orange plastic bag containing the cannabis. Given the confined area in which the cannabis was found beside the second Accused, I am of the opinion that the cannabis was not, at that time in the restaurant, under the custody or control of the first Accused.

It was also contended that the orange plastic bag containing the cannabis could very well have been placed beside the second Accused by the first Accused who was earlier on the five-foot way seen carrying an orange plastic bag. Assuming that the orange plastic bag which the first Accused earlier carried was the same one found beside the second Accused and therefore tending to suggest that the first Accused, before his entry into the restaurant, had custody or control of the cannabis, that does not mean that the custody or control cannot pass from the first Accused to the second Accused. What it means is that the two accused had custody or control of the cannabis at different times and places. The second Accused is concerned with the latter custody or control at the restaurant for which the charge against him arises. There can a chain of people having custody or control of the same drug at various times and places; each earlier custody or control of which does not render the subsequent custody or control any less a custody or control. It, therefore, does not matter that the first Accused was seen earlier carrying the said orange plastic bag containing the cannabis assuming that it was the same orange plastic bag that was found beside the second Accused; the first Accused had the earlier custody or control while the second Accused had the later custody or control.

At the close of the case of the prosecution the second Accused's knowledge of the cannabis was merely presumed as a result of his custody or control of the cannabis and as a result of the second Accused attempting to run away and to screen the orange plastic bag containing the cannabis from the sight of PW7. In view of the denial of the second Accused that there was any orange plastic bag in the restaurant and thereby disclaiming any knowledge of any cannabis, the prosecution evidence had to be looked at again to see whether there is any doubt at all as to whether the second Accused knew there was cannabis in the orange plastic bag. This exercise had to be carried out in the face of the denial of the second Accused that he had any knowledge of the cannabis even though I disbelieve the

second Accused. This would necessary mean considering:

(1) the fact that the second Accused was never seen holding the orange plastic bag containing the cannabis, not even during the time when PW4 was in the restaurant; and

(2) the fact that the police did not even attempt to establish that the second Accused's finger-print was on the said orange plastic bag;

Though there was no evidence that the second Accused had ever held the orange plastic bag containing the cannabis, there is the evidence that the second Accused attempted to run away and to screen the orange plastic bag containing the cannabis; such conduct is indicative that the second Accused knew what was in the orange plastic bag and that he was trying to rid himself of the incriminating evidence. As for the lack of finger-print evidence incriminating the second Accused, I would say that ideally that should be required of every case where possession of a drug is alleged but that is not what the law requires. The law only requires proof beyond reasonable doubt on the part of the prosecution. Even though there is a lack of incriminating finger-print evidence against the second Accused, there is still the said facts of the second Accused attempting to run away and attempting to screen the orange plastic bag containing the cannabis. This makes up for the lack of incriminating finger-print evidence.

As for the custody or control of the first Accused before his entry into the restaurant, I have no doubt that be that as it may the custody or control had, in the restaurant, passed to the second Accused.

The burden was on the second Accused to rebut, on a balance of probabilities, the presumptions arising from custody or control of the orange plastic bag containing the cannabis. The evidence of the second Accused was only one of denial; denial of having ever seen the orange plastic bag containing the cannabis, denial of having been together with the first Accused, denial of sitting on the same chair together with the first Accused and denial of being found immediately next to the orange plastic bag containing the cannabis. All these evidence of the second Accused were offered in contradiction to the evidence of the prosecution. The denials have not in any way created any doubt, on a balance of probabilities, in the case of the prosecution. Neither were the presumptions of possession or knowledge rebutted. Nothing was offered by the evidence of the second Accused by way of rebutting the presumption of trafficking arising from the fact that the cannabis weighed 311.4 grammes. The second Accused had also therefore failed to rebut the presumption of trafficking.

VII. *Conclusion*

In the premises I find the second Accused guilty and convict him of the offence of trafficking in 311.4 grammes in cannabis in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952. But I cannot pass a sentence of death as I find that the second Accused was at the time of the commission of the offence under the age of 18 years old. The only evidence of the age of the second Accused that was adduced by the prosecution was that of the opinion of one Dr. Sethu Nagappan (PW2). Briefly put, PW2 was of the opinion that the second Accused was on 6 February 1987 "about 19 years old" but that there could be a margin of error one year. Since the offence was committed on 20 January 1987 and allowing for the one year margin of error and assuming that such opinion evidence is admissible, the second Accused could very well be under 18 years old. The second Accused and his mother (DW2) gave evidence to the effect that the second Accused was under 18 years of age at the date of the commission of the offence. There is a doubt here as to the actual age of the second Accused and it should be resolved in favour of the second Accused.

Given my decisions above and in accordance with s. 16 of the Juvenile Courts Act 1947, I order the second Accused be detained during the pleasure of his Excellency, the Yang Di-Pertua Negeri Sabah.

The cannabis is to be destroyed by burning in the compound of the Court and in the presence of the Senior Assistant Registrar of the High Court in Borneo at Tawau after the disposal of the appeal against the decision herein, if any, or after the expiry of the time for appeal if there is no appeal.